IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:05-CV-00329-GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

RESPONSE OF STATE OF OKLAHOMA TO PETERSON FARMS INC.'S SEPTEMBER 19, 2007 MOTION TO COMPEL DISCOVERY (Dkt. #1276)

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COMES NOW, the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, (hereinafter "the State") and hereby responds to Defendant Peterson Farms, Inc.'s Motion to Compel Discovery (Dkt. # 1276).

INTRODUCTION

Peterson Farms, Inc. ("Peterson") challenges a number of items listed on the State's privilege log, arguing narrow and unreasonable interpretations of the attorney-client privilege and work-product doctrine. If adopted, Peterson's interpretations would undermine the societal interests served by both the attorney-client privilege and work-product doctrine. Under the circumstances of this case, federal law determines applicability of both the attorney-client privilege and work-product doctrine. Under Peterson's incorrect interpretations, very few documents could ever be withheld on the basis of recognized privileges and protection, negating the broad and well established federal law of attorney-client privilege and work-product doctrine.

Additionally, Peterson seeks to have the State continually revise its privilege logs. As the State demonstrates below, its privilege logs comply with the requirements of Rule 26(b)(5) and LCivR 26.4 and sufficiently establish the privileges claimed under the applicable law of the attorney-client privilege and the work-product doctrine. Moreover, the State's privileges and work-product protections from earlier investigations, claims, and actions survive the termination of those investigations, claims, and actions, regardless of their degree of relationship with the current case.

The State has committed to produce documents for which it has withdrawn claims of privilege in revising its privilege logs and will do so. Additionally, to the extent any scrivener's errors remain in those logs, the State will correct them.

ARGUMENT AND AUTHORITY

1. The State's Privilege Logs Adequately Establish Attorney-Client Privilege.

A. In federal question cases in which pendant state claims are raised, the federal common law of privilege applies.

The federal law of attorney-client privilege applies in this federal question case with pendant state law claims. Even the cases cited by Peterson, *see* Peterson Motion, pp. 8-9, establish that "in cases where pendent state claims are raised, the federal common law of privileges should govern all claims of privilege raised in the litigation." *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 458-59 (N.D. Cal. 1978) (emphasis added).

Analysis of the federal law of attorney-client privilege begins with Federal Rule of Evidence 501 which provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of

> reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Thus, in cases in which only federal questions exist, privileges are determined by the federal common law. In diversity cases in which only state claims exist, privileges are determined in accordance with State law of privileges.

The Tenth Circuit has noted in *dicta* that where both federal and state claims are implicated, then the lower courts could apply an "analytical solution" to solve any conflict:

> With both federal claims and pendent state law claims implicated, we should consider both bodies of law under *Motley* and Fed. R. Evid. 501**.** If the privilege is upheld by one body of law, but denied by the other, problems have been noted. "In this situation, permitting evidence inadmissible for one purpose to be admitted for another purpose defeats the purpose of a privilege. The moment privileged information is divulged the point of having the privilege is lost." 3 *Weinstein's Federal Evidence,* § 501.02[3][b] (Matthew Bender 2d ed.) (citing *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 458 (N.D.Cal. 1978)). If such a conflict on the privilege exists, then an analytical solution must be worked out to accommodate the conflicting policies embodied in the state and federal privilege law.

Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1368-69 (10th Cir. 1997). The Tenth Circuit, however, never developed an "analytical solution" in that case because the attorney-client privilege applied regardless of what law applied. *Id*, at 1369.

In practice, where courts have actually addressed the problem of which law to apply in cases involving both state and federal claims, courts have uniformly applied the federal common law of privilege. For instance, the Third Circuit wrote that the federal law of privilege must apply in this situation:

> Thus, federal courts are to apply federal law of privilege to all elements of claims except those "as to which State law supplies the rule of decision." In general, federal privileges apply to federal law claims, and state privileges apply to claims arising under state law. The present case, however, presents the complexity of having both federal and state law claims in the same action. The problems

> associated with the application of two separate privilege rules in the same case are readily apparent, especially where, as here, the evidence in dispute is apparently relevant to both the state and the federal claims**.** This court has resolved this potential conflict in favor of federal privilege law. Noting that "applying two separate disclosure rules with respect to different claims tried to the same jury would be unworkable," we held that "when there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule." *Wm. T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982). Accordingly, for the resolution of the present discovery dispute, which concerns material relevant to both federal and state claims, Rule 501 directs us to apply federal privilege law.

Pearson v. Miller, 211 F.3d 57, 66 (3d Cir. 2000) (emphasis added) (footnotes omitted).

Even Peterson's chief case, *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455 (N.D. Cal. 1978), contrary to Peterson's suggestion, applies the federal law of privilege in similar circumstances:

> In the absence of any indication as to legislative intent in the language or legislative history of Rule 501, the Court believes that in federal question cases where pendent state claims are raised the federal common law of privileges should govern all claims of privilege raised in the litigation. This was the approach suggested by the Senate Judiciary Committee (see S. Rep. No.1277, 93d Cong., 2d Sess. 12 n. 16, reprinted in (1974) U.S. Code Cong. & Admin. News, p. 7059 n. 16), and it seems to be the approach most consistent with the policy of Rule 501. That policy, simply stated, is that "(i)n nondiversity jurisdiction civil cases, federal privilege law will generally apply." H.R. Rep. No.1597, 93d Cong., 2d Sess. 7, reprinted in (1974) U.S. Code Cong. & Admin. News, p. 7101. It should not be cast aside simply because pendent state claims are raised in what is primarily a federal question case.

Perrignon, 77 F.R.D. at 458-59 (emphasis added).

Another case, *Andritz Sprout-Bauer v. Beazer East*, 174 F.R.D. 609, 633 (M.D. Pa. 1997), cited by Peterson in its Motion, p. 10, also holds that in a federal question case with supplemental state law claims, the federal law of privileges governs the entire case, relying upon *William T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982).

Therefore, there can be no dispute that the general federal common law of privilege applies to the instant case uniformly, and the Court need not switch back and forth as Peterson suggests, in order to determine whether to apply the Oklahoma or federal law of privilege, especially where, as here, the same evidence will likely be used to support both federal and state law claims. Because the federal law of attorney-client privilege applies, Peterson's strained arguments based upon its view of the requirements of state law are irrelevant.

B. Under federal law, the attorney-client privilege extends beyond the life of any litigation.

The federal common law is well-established. Under the federal common law, the essential elements of the attorney-client privilege are: "(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such (3) the communication relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection is waived." *Lewis v. Unum Corporation Severance Plan*, 203 F.R.D. 615, 618 (D. Kan. 2001) (emphasis added). The privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice. *See id. (quoting Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981)).

When communications are made during the existence of an attorney-client relationship, the privilege continues to protect them from disclosure even after that relationship has been terminated. *Chandler v. Denton*, 741 P.2d 855, 865 (Okla. 1987). The Tenth Circuit has noted that release of information or documents even indirectly implicating the attorney-client privilege:

> would make a defendant "reluctant to reveal information that could help the attorney in the defense of the case, or in analyzing the strength of the case for trial." *Gonzales*, 1997 WL 155403, at *8; *see Crystal Grower's Corp. v.*

> *Dobbins*, 616 F.2d 458, 461 (10th Cir.1980). The importance of this privilege and doctrine is well-established, *see Upjohn Co. v. United States*, 449 U.S. 383, 389-92, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), a point which the Supreme Court just recently reemphasized in holding that the attorney-client privilege extends beyond the death of the client. *See Swindler & Berlin v. United States*, 524 U.S. 399, 118 S.Ct. 2081, 2084-88, 141 L.Ed.2d 379 (1998). Certainly, then, the privilege does not terminate when the Defendants' trials are over.

U.S. v. Gonzales, 150 F.3d 1246, 1266 (10th Cir. 1998) (emphasis added) (footnote omitted). Thus, the attorney-client privilege extends beyond the end of the attorney-client relationship, beyond the life of the client (with exceptions not pertinent here) and beyond the life of the litigation or case giving rise to it. Once the privilege attaches to a communication, that communication remains privileged, unless there is a waiver by the client.

C. Even if it were applicable, which it is not, Oklahoma law of attorney-client privilege is not as narrow as Peterson asserts.

Even if the Court were to be required to apply Oklahoma's law of attorney-client privilege, which it is not, Oklahoma law is far less narrow than Peterson would have it believe. 12 Okla. Stat. § 2502 states, in pertinent part:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> 1. Between the client or a representative of the client and the client's attorney or a representative of the attorney;
>
> 2. Between the attorney and a representative of the attorney;
>
> 3. By the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein;
>
> 4. Between representatives of the client or between the client and a representative of the client; or
>
> 5. Among attorneys and their representatives representing the same client.

12 Okla. Stat. § 2502(B). By the plain terms of the statute, confidential communications made for the purpose of facilitating the renditions of professional legal services to the client are covered even when those communications are between "representatives of the client" or between "the client and a representative of the client," and not merely between the attorney and the client. Thus, confidential communications between state employees for the purpose of facilitating the rendition of professional legal services may remain confidential because "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). This is particularly important in technical fields such as environmental enforcement because State agency employees must supply the Attorney General and agency counsel with technical data and evidence to help in the rendition of professional legal services to the State and its agencies. Those agency employees must necessarily communicate among themselves confidentially in order to gather and assess evidence to be presented to counsel.

Peterson nonetheless focuses in on the provision of Oklahoma law that provides:

> D. There is no privilege under this rule: . . . 7. As to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

12 Okla. Stat. § 2502(D)(7). This statute indicates that the privilege attaches when an investigation, claim (either by or against the State), or action (either in court or in an administrative agency) is pending. It does not address when, if ever, the privilege ceases to apply. Put another way, contrary to Peterson's suggestion, this provision does not address the duration of the privilege, but rather the prerequisites to the creation of a privilege claim. Of

course, because the federal common law of privilege, and not this Oklahoma statute, applies to the present case, the Court need not burden itself with determining when specific investigations, claims, or privilege were pending, or whether maintaining the privilege is necessary to avoid seriously impairing the State's ability to process, prosecute or defend investigations or litigation in the public interest.

D. The provisions of the Oklahoma Open Records Act do not apply to this case.

The Oklahoma Open Records Act does not strip the privileged or protected status of confidential attorney-client communications, work product, or the contents of state attorney investigative or litigation files that are not otherwise public documents. While the Oklahoma Open Records Act provides that many state records are to be open for public inspection, Peterson admits that standard evidentiary privileges always apply under the Oklahoma Open Record Act, as does a protection for the investigatory or litigation files of the Attorney General or agency attorneys. *See* Peterson Motion, p. 6. Indeed, the State did not claim privilege over any document that would have been otherwise produced under the Oklahoma Open Records Act.

The attorney-client privilege applies to confidential communications coming within its terms, even if those communications are kept in the "regular files of the responding agencies." After all, confidential attorney-client communications are kept in the files of the client, as well as in the files of the attorney. Such a confidential communication need not be in the litigation file of counsel in order to maintain its privileged status. Nothing in 29 Okla. Op. Atty. Gen. 280, cited by Peterson, Motion p. 8, stands for the contrary.

E. The State's privilege logs comply with the Federal and Local Civil Rule and provide the required information to substantiate the State's claims of privilege.

As demonstrated above, the federal common law regarding attorney-client privilege applies to this case. Local Civil Rule 26.4(a) sets forth the elements required in a privilege log.

A privilege log must provide the type of document; the date of the document; the author of the document; whether or not the author is a lawyer; each recipient of the document; and the privilege asserted. Local Civil Rule 26.4(b) exempts from the requirement of a privilege log written communications between a party and its trial counsel and work-product material created after the commencement of the action. The State's privilege logs comply with the requirements of Rule 26 and Local Civil Rule 26.4(a). Neither of those rules requires the burdensome additional information sought by Peterson, and Peterson's claims for such information should be rejected. Thus, Peterson's theories based upon its reading of the requirements of Oklahoma privilege law are irrelevant.

Peterson makes lengthy arguments about two particular topics over which the State asserted attorney-client privilege, investigations involving Jock Worley and Lake Frances. In fact, the State has already provided adequate information regarding these matters on its privilege log. Peterson claims that the State is trying to "hide" documents related to the Jock Worley gravel mining operation and has expressed some doubt that the State's dealings with this site have continued for over ten years. This doubt is misplaced – the State has pursued this case for over ten years. *See* Ex. 1, Affidavit of Ellen Phillips. Peterson also neglects to inform the court that the State produced all non-privileged Jock Worley documents at its agency production and neglects to inform the Court that it had the opportunity to review and copy the Jock Worley permit file when it received documents from the Oklahoma Department of Mines Open Records document production.

And with regard to the other matter, Peterson fails to inform the Court that the State produced all non-privileged documents regarding Lake Frances, City of Watts, Fayetteville, and Adair County RWD NO. 5. The State has produced the permit files for the City of Watts and

Adair County RWD No. 5, which contain all the relevant information Defendants are entitled to under the Rules. Further, the State has provided numerous documents at various agencies regarding Lake Frances and Fayetteville, which again provide all relevant information Defendants are entitled to under the Rules. Therefore, Peterson's key examples only support the State's position, not Peterson's.

On another matter, Peterson asserts that the State is claiming that Trevor Hammons, Assistant Attorney General for the State, received a letter in 1989 regarding Lake Frances as a possible public nuisance. It is true that the revised log reflects this entry and Peterson Defendants skeptically point out that Mr. Hammons could not have received this document. It is also true that Mr. Hammons was in eighth grade at Longfellow Middle School in Norman, Oklahoma, during this time and in fact was not the recipient of the document. It is also true that Mr. Hammons did not become a member of the bar until October 2004. This does not demonstrate some nefarious intention on the State as Peterson Defendant indicates, rather it shows that the State made a typographical error when using Microsoft Excel's auto-fill function. The State is not trying to confuse or hinder Defendants' ability to evaluate the State's claim of privilege; rather the State made an error that the State will correct.[1]

Peterson's arguments are misplaced and unsupported. It is clear that the State's privilege logs are adequate and fully comply with all applicable rules.

II. The State's Privilege Logs Adequately Establish Work-Product Protection.

A. Work product from previous cases remains protected.

Peterson also tries to argue that work product created for prior litigation remains protected only if the earlier litigation was "closely related" to the present case. Peterson Motion,

[1] Had Peterson attempted to meet and confer with the State about this issue, which it failed to do, any confusion regarding this privilege log entry could have been easily resolved.

p.16. But, the leading Tenth Circuit case on this subject does not support Peterson's position. In *Frontier Refining, Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 702 (10th Cir. 1998), the Tenth Circuit held that the district court had abused its discretion in denying work-product protection to work product from an earlier case without the showing of substantial need and undue hardship found in Rule 26(b)(3). The court found that the district court's position was against the great weight of well-reasoned authority. The Court explained that:

> The Supreme Court has recognized in dicta that "the literal language of [Rule 26(b)(3)] protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation." *FTC v. Grolier Inc.*, 462 U.S. 19, 25, 103 S.Ct. 2209, 2213, 76 L.Ed.2d 387 (1983). According to the Supreme Court's dicta, Rule 26's language does not indicate that the work product protection is confined to materials specifically prepared for the litigation in which it is sought. Work product remains protected even after the termination of the litigation for which it was prepared. *See id.* The language from *Grolier* set out above, although dicta, provides a particularly strong indication that Rule 26(b)(3) applies to subsequent litigation. *See Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir.) (stating that "this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements"), *cert. denied*, 517 U.S. 1211, 116 S.Ct. 1830, 134 L.Ed.2d 934 (1996).

Frontier Refining, 136 F.3d at 703 (emphasis added). As *Frontier Refining* clearly states, the Supreme Court has decided, "[w]ork product remains protected even after the termination of the litigation for which it was prepared." *Frontier Refining*, 136 F.3d at 703. Thus, this Court should hold that work product from prior cases, whether "closely related" or not, is protected.[2]

Furthermore, a document may be "prepared in anticipation of litigation" so as to qualify for the attorney work-product privilege even without a case already docketed or where the agency is unable to identify the specific claim to which the document relates. The privilege

[2] Even assuming arguendo that work product from a prior litigation needs to be "closely related" to present litigation in order for the protection to survive, the fact that Peterson is requesting such materials in this case is a plain indication that they are "closely related." Otherwise, Peterson would essentially be conceding that requested materials were not relevant.

"extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated." *Heggestad v. U.S. Dept. of Justice*, 1182 F. Supp. 2d 1, 8 (D.D.C. 2000). Thus the privilege extends to documents that "address the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome," even where the identity of the prospective litigation opponent is unknown. *Id.*

B. The State's privilege logs comply with the requirements of Local Civil Rule 26.4.

Nothing in Local Civil Rule 26.4 requires a party to identify the "actual litigation for which the document was created" as Peterson asserts in its motion. *See* Peterson Motion, p. 15. Instead, the Rule requires a party to provide the type of document, the date of the document, the author of the document, whether or not the author is a lawyer, each recipient of the document, and the privilege asserted. The State's privilege log was organized to provide the categories required by Local Civil Rule 26.4 and does in fact provide the required information.

In the present case, Peterson feigns ignorance about what particular litigation was the source of the State's claims of work-product protection, *even though Peterson has seen voluminous records of those cases for which the State has not claimed any privilege or protection.* Having seen the larger universe of documents, Peterson cannot pretend it does not know what actions or litigation the items on the privilege log refer to. For example, the first page of Peterson's Exhibit 11, the list of challenged work-product designations, contains references to a proposed enforcement action against Simmons Industries, regulatory violations at a facility under the jurisdiction of the ODA, and five documents referring to Sequoyah Fuels Corporation.

Given Peterson's access to the larger body of State documents, it can easily connect most of these references to particular cases, but would apparently rather force the Court to have to do

so in an *in camera* presentation. Peterson has willfully declined to connect the necessary and available dots, and has undoubtedly over-challenged the State's designations, giving rise to the necessity of bringing the challenged documents before the Court *in camera*.

Peterson is essentially claiming that the State is "hiding" documents helpful to Peterson's defenses under a claim of attorney work-product protection. Nothing could be farther from the truth. The State has claimed work-product protection and attorney-client privilege only for those documents which warrant the protection, regardless if they are "helpful" to Peterson or not. It is true, as Peterson alleges, that many of the State's claims of work-product protection are for documents which do not involve Defendants, poultry operations and poultry litter. In fact, the only reason documents pertaining to these topics were produced is because Defendants requested them.

Peterson cites several examples where it believes the State is "hiding" documents behind a claim of work-product protection. The first example that Peterson uses is regarding the Sequoyah Fuels Corporation. Peterson Motion, p. 18. SFC is a former uranium conversion plant located in Gore, Oklahoma. It is located at the bottom of the Illinois River Watershed, several miles downstream from the Tenkiller Dam. The State, specifically the Oklahoma Department of Environmental Quality and the Oklahoma Attorney General's Office, has been intimately involved in the decommissioning proceedings of this former uranium conversion plant. The State has also been involved in license amendment proceedings regarding this facility for several years. The documents claimed as work product are in fact work product and they were being created in anticipation of litigation. *See* Ex. 2, Affidavit of J. Trevor Hammons.

As evidenced by the affidavit of Trevor Hammons, the Sequoyah Fuels Corporation has been the subject of longstanding court and federal administrative action. Peterson challenges

ODEQ entry number 7, a letter from ODEQ attorney Martha Penisten to her client ODEQ employee Barry Stephensen, transmitting CDs from Assistant Attorney General Kelly Burch and relating to regulation of hazardous waste from SFC, for which the State claimed both attorney-client and work-product protection. Thus, this is a communication from an attorney to a client transmitting the work product of yet another attorney, and is certainly entitled to protection. Contrary to Peterson's assumption, that invocation of privilege and protection need not be "closely related to the land application of poultry litter within the IRW." Peterson Motion, p. 18. Additionally, although the SFC plant is downstream of Lake Tenkiller and barely even in the IRW, Defendants claim it has been "identified by the Defendants as a potential contributor to the alleged pollution of the IRW," undermining their own assertion that it is not "closely related" to this case.

Peterson also challenges ODEQ entry 105, Peterson Motion, pp.18-19, in which Assistant Attorney General Jeannine Hale sent a fax to her client Wayne Craney of ODEQ discussing "Whorley" the gravel mine which, according to the affidavit of Assistant Attorney General Ellen Phillips, has been the subject of proceedings before the Department of Mines. *See* Ex. 1. Once again, this is a communication from an attorney to a client, and the State's invocation of both the attorney-client privilege and work-product protection is appropriate without regard to whether the subject is "closely related" to the allegations against the Defendants in this case.

Peterson's erroneous assertion of the requirement that prior work product be "closely related" continues with its challenge to ODEQ entries 9, 10, 24, 31, and 41. Each of these is a communication from a laboratory or retained consultants to Assistant Attorney General Kelly Burch about reclamation plans or corrective action plans for SFC, the subject of ongoing litigation and federal administrative proceedings. Nothing about this expert work product must

be "closely related" to the current case to continue the work-product protection claimed by the State.

OWRB entry 9 is a memorandum from OWRB General Counsel Thomas Lay to his client OWRB Director James Barnett regarding pollution remedies and jurisdictional considerations under the Arkansas Oklahoma River Compact Commission for which the State claimed both attorney-client privilege and work-product protection. These claims of privilege and protection clearly apply to a communication directly from an attorney to his client, containing his mental impressions, legal theories, and strategies, despite Peterson's overheated assertion that the State is trying to "hide" a document that might support its defense.

Peterson's challenges to OSRC entries 11 and 12, are equally unavailing. Both of those items are communications from Assistant Attorney General Brita Haugland to her client OSRC Administrator Ed Fite regarding legal analysis relating to potential litigation regarding Lake Frances, for which the State claimed both attorney-client privilege and work-product protection. Lake Frances was once a lake on the Illinois River just inside the State of Oklahoma which trapped pollution coming into the State from Arkansas before its dam broke and that pollution was allowed more readily to flow down the Illinois River and into Oklahoma. The challenged communications are squarely within both the attorney-client privilege and work-product protection because they contain the mental impressions of counsel about potential litigation.

C. Peterson has not demonstrated substantial need and undue hardship or exceptional circumstances and impracticability to obtain facts or opinions by other means.

Peterson has no substantial need to invade the State's work product in order to defend itself or any exceptional hardship from its inability to do so. It is entirely disingenuous and incorrect of Peterson to claim that the State has placed evidence demonstrating the conditions of the IRW or the State's knowledge of those conditions "under the lock and key of their privilege

claims." Peterson Motion, p. 21. The State has produced a large volume of documents in response to the Defendants' requests regarding these very topics. For example, the State has produced 35 boxes of documents regarding Sequoyah Fuels Corporation, and the permit file for Jock Worley's gravel mining operation.

Peterson also seeks expert work product about Sequoyah Fuels in 2003-04, and about the City of Watts sewage lagoon, and about the Jock Worley mining permit in 1998-99, on the theory that the situation has changed since those dates and Peterson cannot observe events from those periods. Peterson Motion, p. 22. In regard to Sequoyah Fuels, Peterson has not sufficiently articulated why this site is relevant to the case. The Sequoyah Fuels plant at Gore is below the Lake Tenkiller dam, and is barely in the IRW at all. Further, Peterson has not explained how pollution from the lower end of the IRW has migrated northward and uphill to present any issue of consequence to any of its defenses. Nor has Peterson explained why the enormous volume of documents about Sequoyah Fuels which the State has produced are not a more than adequate basis for its own experts to formulate any opinions needed in its defense.

Similarly, the unprivileged and unprotected documents produced by the State about the City of Watts and the Jock Worley mining permit are more than sufficient to allow Peterson's experts to arrive at any necessary opinions about those areas without invading the work-product protection of the State's experts. Consequently, Peterson has failed to show any exceptional circumstances or impracticability to obtain the facts or opinions about the City of Watts or Jock Worley.

D. Peterson's complaints regarding corrections to the State's privilege log are meritless.

Peterson presents no authority for its assertion that revisions and corrections to the State's privilege logs require justification and *in camera* review. Peterson wanted the State to improve

its privilege logs, and the State did so by correcting administrative and typographical errors. Now Peterson wants the State to explain how and why the State corrected certain entries in its logs. Once again, this is a make work project foisted on the State, and has nothing to do with any substantive challenge to the State's assertions of privilege and protection. This argument should be rejected. The State will correct any scrivener's errors and produce any withdrawn documents from these revised logs.

CONCLUSION

The federal law of attorney-client privilege applies in this federal question case with pendant state claims and the State's privilege logs adequately establish the attorney-client privilege. The State's claims of work-product protection are valid and survive from previous investigations or litigation and the Defendants have not demonstrated the requisite substantial need to receive these documents. For all the foregoing reasons, Peterson's Motion to Compel should be denied in its entirety.

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